SUPREME COURT, U.S.
FILED
JUL 9 - 2004
OFFICE OF THE CLERK

No. 03-1527

IN THE SUPREME COURT OF THE UNITED STATES

JERRY PAUL HENDERSON,
Petitioner,

v.

DONAL CAMPBELL,
Commissioner, Alabama
Department of Corrections,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit
(No. 01-16901)

BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

J. Clayton Crenshaw
Assistant Attorney General
Counsel of Record *

Regina F. Speagle
Deputy Attorney General

State of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7300, 242-7423 *

July 12, 2004

CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. On the facts of this case (there being no split alleged), did the Court of Appeals err finding that Henderson did not establish "cause" to excuse the procedural default of his undue-influence argument when Henderson presented neither argument nor facts to that court that could be used to excuse the default and when neither of Henderson's arguments to this Court show that Henderson was impeded by some "external influence" from presenting his undue-influence argument?

2. On the facts of this case (there being no split alleged), did the Court of Appeals err in concluding that the district court's factual findings that Henderson's post-conviction counsel neither had conflicts of interest nor unduly influenced Henderson into waiving state post-conviction proceedings were not clearly erroneous when Henderson himself candidly testified that he was not prompted by counsel to waive post-conviction proceedings?

3. On the facts of this case (there being no split alleged), did the Alabama Court of Criminal Appeals unreasonably apply the "rational choice" test established by this Court in *Rees v. Peyton* in assessing the validity of Henderson's decision to waive post-conviction review merely because Henderson, unlike Rees, now regrets his "knowing, voluntary, and intelligent" decision?

PARTIES

The caption contains the names of all parties in the courts below.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED FOR REVIEW.....i

PARTIES.....ii

TABLE OF CONTENTS.....iii

TABLE OF AUTHORITIES.....vii

OPINIONS BELOW.....1

STATEMENT OF JURISDICTION.....1

STATUTORY PROVISION.....2

STATEMENT OF THE CASE.....2

A. Trial and Direct Appeal.....3

B. State Post-Conviction Proceedings.....4

C. Federal Habeas Proceedings.....5

REASONS FOR DENYING THE PETITION.....7

I. Henderson's Claim That The Court of Appeals's Decision Finding He Did Not Have "Cause" to Excuse The Procedural Default of His "Cause Claim" (That State Post-Conviction Counsel Had Conflicts of Interest, which Unduly Influenced Him to Waive State

Post-conviction Proceedings) Conflicts with This Court's Decisions Does Not Warrant Certiorari Review Because Henderson's "Cause" Argument Was Not Properly Presented Below, The Court of Appeals's Decision Does Not Conflict with Any of This Court's Decisions, The Court of Appeals Did Not Make Erroneous Factual Findings, And The "Cause Claim" Is Without Merit.....8

A. This claim does not present an issue worthy of certiorari review because Henderson's argument that state post-conviction counsel's unrevealed conflicts alone and combined with state procedural deadlines establish "cause" for the default of his undue influence argument was not presented in a timely manner below.....8

B. This claim does not present an issue worthy of certiorari review under Rule 10 because the asserted error concerns factual findings, not the application of legal rules.....10

C. The Court of Appeals properly concluded that Henderson was not prevented from presenting his undue influence argument to Alabama state courts.....11

D. Even if this Court found that Henderson had provided "cause" to excuse the procedural default of his argument that post-conviction counsel had conflicts of interest that caused him to unduly influence Henderson, the argument itself is without merit because the district court has already found that counsel neither had conflicts of interest nor unduly

influenced Henderson into waiving Rule 32 proceedings and the district court's findings are not "clearly erroneous."....16

II. This Court Should Decline to Review Henderson's Claim That Post-Conviction Counsel's Conflicts of Interest Unduly Influenced Henderson To Waive Post-conviction Proceedings Because It Is Without Record Support And Contradicted by Henderson's Own Testimony in The Federal District Court....17

III. This Court Should Decline to Review Henderson's Claim That His Waiver of His Right to Proceed Under Alabama Rule 32 Was Not "Knowing, Voluntary, and Intelligent" Because The Proper Standard, the "Rational Choice" Test, Was Applied and Satisfied and, Moreover, Even If the Test Henderson Advocates Was Applied, the Result Would Be The Same....23

A. The Alabama Court of Criminal Appeals Properly Applied The "Rational Choice" Test from *Rees v. Peyton* In Determining that Henderson Was Competent to Waive His Right to Proceed under Alabama Rule 32 Because Neither A Statutory Nor A Constitutional Right Was Waived, as in *Godinez*, But Post-conviction Proceedings, as in *Rees*....25

B. Even if This Court Were to Hold as Henderson Advocates, That *Godinez* Not *Rees* Applies, the Result Would Be the Same Because the Court of Criminal Appeals Found the Facts That Clearly Show Henderson's Waiver Was "Knowing, Intelligent, and

Voluntary" and the Court of Appeals Has Already Found These Findings Were Not "Clearly Erroneous."....27

CONCLUSION....30

TABLE OF AUTHORITIES

Page(s)

Cases

Amadeo v. Zant,
486 U.S. 214 (1988) 18

Anderson v. Bessemer City,
470 U.S. 564 (1985) 19

Banks v. Dretke,
124 S.Ct. 1256 (2004) 10

Barham v. United States,
724 F. 2d 1529 (11th Cir. 1984) 23

Brown v. Allen,
344 U.S. 443 (1953) 12

Coleman v. Thompson,
501 U.S. 722 (1991) 12

Cuyler v. Sullivan,
446 U.S. 335 (1980) 12, 23

Edwards v. Carpenter,
529 U.S. 446 (2000) 10

Ex parte Henderson,
583 So. 2d 305 (Ala. 1991) 2

Fay v. Noia,
372 U.S. 391 (1963) 16

Godinez v. Moran,
509 U.S. 389 (1993) ..... passim

Henderson v. Alabama,
503 U.S. 908 (1992) 4

Henderson v. Campbell,
353 F.3d 880 (11th Cir. 2003) ..... passim

Henderson v. State,
583 So. 2d 276 (Ala. Crim. App. 1990) 2, 3

Henderson v. State,
733 So. 2d 484 (Ala. Crim. App. 1998) ..... passim

Hoover v. Ronwin,
466 U.S. 558 (1984) 9

Johnson v. Zerbst,
304 U.S. 458 (1938) 27

Manning v. Foster,
224 F.3d 1129 (9th Cir. 2000) 18

Murray v. Carrier,
477 U.S. 478 (1986) 12, 16

Reed v. Ross,
468 U.S. 1 (1984) 12

Rees v. Peyton,
384 U.S. 312 (1966) ..... passim

Rutledge v. State,
745 So. 2d 912 (Ala. Crim. App. 1999) 15

United States v. Mers,
701 F.2d 1321 (11th Cir. 1983) 23

Wainwright v. Sykes,
433 U.S. 72 (1977) 16

Youakim v. Miller,
425 U.S. 231 (1976) 9

Statutes

Code of Alabama
Section 13A-5-40(2) 3
Section 13A-5-40(7) 3

United States Code
28 U.S.C. § 1254(1) 1
28 U.S.C. § 2254 2
28 U.S.C. § 2254(d) 24, 29
28 U.S.C. § 2254(d)(2) 29
28 U.S.C. § 2254(e)(1) 29
28 U.S.C. § 2254(i) 12

Rules

Alabama Rules of Professional Conduct
Rule 1.7 23

Federal Rules of Civil Procedure
Fed. R. Civ. Pro. 52(a) 18

Rules of the Supreme Court of the United States
Rule 10 ..... 1, 11, 18, 24

Alabama Rules of Criminal Procedure
Rule 24.1 14
Rule 32.2(b) 15
Rule 32.2(c) 15
Rule 32.4 14

OPINIONS BELOW

The published opinion of the Alabama Court of Criminal Appeals, affirming the circuit court's judgment that dismissed Henderson's post-conviction petition, is found at *Henderson v. State*, 733 So. 2d 484 (Ala. Crim. App. 1998). The unpublished opinion of the United States District Court for the Northern District of Alabama denying Henderson's habeas petition is duplicated at Petitioner's Appendix D. The published opinion of the United States Court of Appeals for the Eleventh Circuit affirming the district court's denial of habeas relief is found at *Henderson v. Campbell*, 353 F.3d 880 (11th Cir. 2003) (Pet. App. C). The order of the Court of Appeals denying Henderson's petitions for rehearing and rehearing *en banc* are duplicated at Petitioner's Appendix A.

STATEMENT OF JURISDICTION

This Court has jurisdiction to review the issues raised in Henderson's petition under 28 U.S.C. § 1254(1) However, this Court should decline to exercise its jurisdiction because Henderson has not stated compelling grounds for this Court to grant certiorari review. As for the first two issues he raises, Henderson has failed to articulate any of the grounds set forth in Rule 10 of the rules of this Court to invoke certiorari jurisdiction. Moreover, none of the grounds listed in Rule 10 apply to any of the three issues Henderson raises.

STATUTORY PROVISION

The statutory provision set forth on page one of Henderson's certiorari petition, 28 U.S.C. §§ 2254, is at issue and is properly cited.

STATEMENT OF THE CASE

Jerry Henderson ("Henderson") agreed to murder his sister-in-law's husband, Jerry Haney ("Haney"), for $3,000. *Henderson v. State*, 583 So. 2d 276, 280 (Ala. Crim. App. 1990). Henderson planned the murder with his wife, Martha Henderson, and sister-in-law, Judy Haney, for a night when Haney would be alone, created an alibi that evening by inviting friends over to his home, and then feigned sickness, sneaked out of his bedroom window, and drove to Haney's house. *Id.* There, he lured Haney onto the front porch and shot Haney with a shotgun. *Id.* at 280-81. The first two shots did not kill Haney. *Id.* at 281. As Haney lay on the ground pleading for his life, Henderson finished him off with a third shot, point blank, into Haney's face. *Id.*

For three years, the police were unable to solve this crime. *Henderson*, 583 So. 2d at 281. Finally, Martha Henderson unburdened herself to the police; the police arrested Henderson. Henderson confessed to the murder. *Id.* He was tried and convicted of capital murder and sentenced to death. *Id.* at 280. Subsequently, after his capital murder conviction and death sentence were affirmed on direct appeal, Henderson filed a petition for collateral review under Ala. R. Crim. P. 32, but he later dismissed that petition on his own initiative after consulting with counsel and engaging in an extensive colloquy with the circuit court during which he was

informed of the consequences of his decision to dismiss his Rule 32 petition. On appeal, Henderson unsuccessfully argued that he did not waive his post-conviction remedies "voluntarily, knowingly, and intelligently." Later, Henderson filed a federal habeas petition, again making this unsuccessful argument. Henderson also argued for the first time that the dismissal of his Rule 32 petition was the product of undue influence exerted by counsel who allegedly labored under conflicts of interest. The district court rejected both arguments and dismissed Henderson's habeas petition. The Eleventh Circuit affirmed.

A. Trial and Direct Appeal

On May 19, 1998, Henderson was convicted of two counts of capital murder for the death of Haney. CR. 53.[1] He was convicted of one count of murder made capital because he murdered Haney in exchange for receiving $3,000 from his wife and sister-in-law, in violation of Ala. Code § 13A-5-40(7) (1975). He was convicted of one count of murder made capital because he killed Haney while robbing him of $80, in violation of Ala. Code § 13A-5-40(2) (1975). After the sentencing hearing, the jury recommended that Henderson be sentenced to death by a vote of ten-to-two. CR. 54.

The Alabama Court of Criminal Appeals and Alabama Supreme Court affirmed Henderson's conviction and death sentence. *Henderson v. State*, 583 So. 2d 276 (Ala. Crim. App. 1990), aff'd, 583 So. 2d 305 (Ala. 1991). This

---

[1] "CR" refers to the clerk's record that can be found in the first volume of the trial transcript. "Tr." refers to the trial transcript. "R32" refers to the one volume transcript of the Rule 32 proceedings. "EH" refers to the transcript of the evidentiary hearing conducted by United States Magistrate Judge Davis.

Court denied certiorari. *Henderson v. Alabama*, 503 U.S. 908 (1992).

B. State Post-Conviction Proceedings

On October 13, 1993, Henderson, through Jack Gohn, a Maryland attorney, filed a petition for post-conviction relief under Alabama Rule of Criminal Procedure 32. R32 at 4-25. Gohn withdrew from the case on April 5, 1994. *Id.* at 92. On July 30, 1996, Steve Giddens ("Giddens"), of Talladega, was appointed to represent Henderson at the Rule 32 proceeding. *Id.* at 2. On April 22, 1997, the day set for the evidentiary hearing, Henderson dismissed his Rule 32 petition after an extensive colloquy with the trial judge. *Id.* at 112-23. During this colloquy, Henderson stated that he understood that the Rule 32 petition was filed in an effort to win a new trial and that, by dismissing the petition, he was hurting his chances on appeal and, ultimately, speeding up the date of his execution. R32 at 115-22; see *also Henderson*, 733 So. 2d at 486-88. Based on this colloquy, the circuit court found that Henderson was aware of the consequences of his waiver and that he made the waiver knowingly and voluntarily. *Id.* at 128-29. On May 29, 1997, the circuit court entered an order granting Henderson's oral motion to dismiss his Rule 32 petition. *Id.* at 124-29.

Henderson appealed to the Alabama Court of Criminal Appeals arguing that because he did not know the specifics of each claim in the Rule 32 petition, he could not have knowingly waived the proceedings. R32 at 14-15. Henderson did not argue, as he does now, that Giddens had a conflict of interest and unduly influenced him to dismiss his Rule 32 petition. The Alabama Court of Criminal Appeals affirmed the dismissal of Henderson's Rule 32 petition, concluding that Henderson had understood his legal options and made a rational

choice among them. *Henderson v. State*, 733 So. 2d 484, 490 (Ala. Crim. App. 1998). The court further concluded that Henderson dismissed his Rule 32 petition "voluntarily, knowingly, and intelligently." *Id.* The Alabama Supreme Court, after initially granting a writ of certiorari, reconsidered and quashed the writ as improvidently granted. *Henderson*, 733 So. 2d at 484.

C. Federal Habeas Proceedings

Henderson filed a petition in the United States District Court for the Northern District of Alabama for a writ of habeas corpus on April 11, 2000. R1-1. His primary claim was that he had not knowingly and voluntarily decided to dismiss his Rule 32 petition. On January 29, 2001, Magistrate Judge Harwell G. Davis, III ordered an evidentiary hearing on Henderson's petition, chiefly concerning the fact that Rod Giddens ("Rod"), the brother of Henderson's Rule 32 counsel Giddens, had assisted in prosecuting Henderson. At the hearing, Henderson's current counsel called Henderson and Giddens as witnesses.

Giddens testified that he met with Henderson at the county jail the day before the evidentiary hearing. EH. at 18. Giddens had reviewed part of the trial transcript, including "some of the voir dire" and "some of the pre-trial motions" before this meeting. EH. at 28. During his conversation with Henderson, Giddens went over the Rule 32 petition, noting that most of the claims alleged ineffective assistance of counsel. EH. at 21. Giddens also explained to Henderson what evidence could be presented at the evidentiary hearing and what the potential relief was. *Id.* Henderson responded that "he did not have any problem with his attorneys because he was guilty and that they did as well as they could do defending a guilty man." *Id.* Henderson then told Giddens he wanted the

Rule 32 petition dismissed. EH. at 25-26. Giddens testified that he informed Henderson of the consequences of dismissing the Rule 32 petition. EH. at 44. Giddens told Henderson that if he dismissed the petition, no evidence could be presented, and the court would not decide any of the claims. EH. at 45. Giddens told Henderson there would then be nothing to appeal but the dismissal itself and, starkly, that dismissing the petition would "get him one step closer to an execution date." EH. at 45. Giddens also testified that, when the circuit court engaged Henderson in a colloquy regarding his waiver, he did not tell Henderson what to say or prompt him in any way. EH. at 51. Giddens further testified that he did not know his brother was involved in Henderson's prosecution until he received the federal district court's notice for the evidentiary hearing. EH. at 35-36, 37, 42.

Henderson testified that the circuit court had reviewed with him the consequences of withdrawing his Rule 32 petition. EH. at 64. Henderson also agreed that he told Giddens he was guilty of the crime and that he thought his trial counsel had done a good job. EH. at 62. Most importantly, Henderson agreed that Giddens did not prompt him to dismiss his petition: "I don't think he [Giddens] prompted me to. I think we settled our conversation and it basically come down to that's what I thought I wanted to do." EH. at 63.

Based on this testimony, the Magistrate Judge issued a Report and Recommendation that the district court deny Henderson's habeas petition. R1-41. The Magistrate Judge concluded that Henderson "understood the significance of what he was doing and the consequences thereof." Pet. App. E. at 123a. The Magistrate Judge further concluded that Giddens "was unaware of his brother's prior involvement in the original

prosecution of Henderson and that there is no evidence that he exerted any undue influence on petitioner for that or any other reason." Pet. App. E. at 123a. United States District Judge Dean Buttram adopted the Report and Recommendation and, on October 31, 2001, entered final judgment, denying Henderson's habeas petition. R1-45.

The Court of Appeals held that the state court's determination that Henderson understood the consequences of his decision and was able to make a rational choice among his options was not contrary to or an unreasonable application of clearly established federal law. *Henderson v. Campbell*, 353 F.3d 880, 894-95 (11th Cir. 2003). The Court of Appeals further held that the state court's determination of the facts was not unreasonable. *Id.* The court also held that Henderson's undue-influence argument, based on Giddens's alleged conflicts of interest, was procedurally defaulted and that Henderson failed to establish cause for this default. *Id.* at 899-900. Finally, the court held that, even if the undue influence argument was not procedurally barred, it was without merit. Accordingly, the court affirmed the judgment of the district court.

REASONS FOR DENYING THE PETITION

It is worth emphasizing at the outset that the petition does not so much as allege that the courts of appeals are divided on any relevant question. Rather, at bottom, the petition seeks – at most – fact-bound error correction. Because no traditional ground warranting certiorari exists here – and, indeed, because no reversible error exists here – the court should deny certiorari.

I. Henderson's Claim That The Court of Appeals's Decision Finding He Did Not Have "Cause" to Excuse The Procedural Default of His "Cause Claim" (That State Post-Conviction Counsel Had Conflicts of Interest, which Unduly Influenced Him to Waive State Post-conviction Proceedings) Conflicts with This Court's Decisions Does Not Warrant Certiorari Review Because Henderson's "Cause" Argument Was Not Properly Presented Below, The Court of Appeals's Decision Does Not Conflict with Any of This Court's Decisions, The Court of Appeals Did Not Make Erroneous Factual Findings, And The "Cause Claim" Is Without Merit.

The attempt by Henderson's counsel to claim that Giddens had conflicts of interest that caused him to influence Henderson unduly is barred, because Henderson did not raise this claim in his state court appeal from the dismissal of the Rule 32 petition. In any event, it is without record support and contradicted by Henderson's own testimony in the federal district court.

A. This claim does not present an issue worthy of certiorari review because Henderson's argument that state post-conviction counsel's unrevealed conflicts alone and combined with state procedural deadlines establish "cause" for the default of his undue influence argument was not presented in a timely manner below.

Henderson argues that post-conviction counsel's unrevealed conflicts of interest (that his brother prosecuted Henderson and that he and the victim's brother enjoyed a "long-time friendship") alone and combined with state procedural deadlines establish "cause" for the default of his undue influence argument.

Pet. at 20. This argument, however, was not raised below until after the Court of Appeals issued its decision. *See Henderson,* 353 F.3d at 899 ("Henderson has not advanced any argument of his own that his failure to raise the undue influence issue in the state court following the Rule 32 dismissal should be excused by this Court, and has presented no facts to this Court that could reasonably serve as a basis for excusing such failure."). In his brief to the Court of Appeals, Henderson noted *Giddens's failure to reveal* his alleged conflicts of interest, but he made no argument that this failure established "cause" for the default of the undue influence argument. Likewise, Henderson asserted no argument that state procedural deadlines established "cause" or that state deadlines caused the "impossibility of State Court presentment." Pet. At 18-19. Henderson asserted these arguments for the first time in his application for rehearing.

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller,* 425 U.S. 231, 234 (1976). This Court further stated in *Hoover v. Ronwin,* 466 U.S. 558, 573 (1984), that an argument made for the first time in a response to a motion for rehearing was not made in a timely manner and precluded review by this Court. Similarly, Henderson's argument raised for the first time in his application for rehearing was also untimely and, accordingly, should preclude this Court's review. Henderson's case does not warrant an exception to this Court's general rule precluding consideration of untimely arguments. Accordingly, this Court should not review this claim.

B. This claim does not present an issue worthy of certiorari review under Rule 10 because the

asserted error concerns factual findings, not the application of legal rules.

Rule 10 of this Court's rules enumerates three reasons considered by this Court to be compelling reasons for exercising certiorari jurisdiction. Not only has Henderson failed to cite any of these three grounds as a basis for certiorari review, this claim does not lend itself to any one of these categories.

Henderson baldly asserts that the Court of Appeals's decision (finding that he had no "cause" to excuse his failure to raise his post-conviction counsel's alleged conflicts of interest in state court and, thus, could not use this "cause" claim to excuse his waiver of state post-conviction proceedings) is "inconsistent with this Court's decisions with respect to the 'cause and prejudice' standard, including *Edwards v. Carpenter*."[2] Pet. at 15. Henderson, however, never explains how the Court of Appeals's decision conflicts with *Edwards* or any other decision of this Court.[3] Rather, Henderson argues that the Court of Appeals improperly found that he could not satisfy the "cause and prejudice" standard regarding his conflict of interest "cause claim." Specifically, Henderson argues that "[t]he unknown, unrevealed conflicts of interest on [Giddens's] part," alone and "together with the

---

[2] The Court of Appeals thoroughly explained why "the rule set forth in *Edwards* applies to Henderson's argument for cause based on undue influence." *Henderson*, 353 F.3d at 896-97.

[3] Henderson's assertion that *Banks v. Dretke*, 124 S. Ct. 1256 (2004), imposed an affirmative duty on Giddens to reveal his alleged conflicts is incorrect. At issue in *Banks* was the State's failure to provide *Brady* material to a defendant and the State's repeated misrepresentations that it had disclosed all relevant information. *Banks*, 124 S. Ct. at 1273-74. Therefore, *Banks* concerned a *prosecutor's* duty to disclose information relevant to a *Brady* claim, not to state *post-conviction counsel's* duty to disclose alleged conflicts of interest to an *inmate*.

procedural deadlines appearing in the pertinent state court rules, demonstrate 'cause.'" Pet. at 20. Apparently, Henderson merely disagrees with the Court of Appeals's finding that he could have raised his conflict of interest argument in state court. This disagreement does not warrant certiorari review. *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings[.]"). Moreover, the court's factual findings are not erroneous.

C. The Court of Appeals properly concluded that Henderson was not prevented from presenting his undue influence argument to Alabama state courts.

The marrow of Henderson's claim is that he had "cause" to excuse the procedural default of his undue influence argument because of counsel's failure to reveal the alleged conflicts of interest alone and combined with state procedural deadlines, which, he asserts, made it impossible to present this argument to Alabama courts. Not only is this claim not properly before this Court because it was not made below, *see* I.A of this brief, it is also without merit.

Henderson asserts that he could not have discovered Giddens's conflicts of interest, that Giddens's brother prosecuted him and that Giddens was a "friend"[4] of the victim's brother, unless informed by Giddens himself. Henderson also asserts that, contrary to the Court of Appeals's findings, he could not have raised this conflict of interest argument in a timely manner in state court. Counsel's failure to reveal these alleged conflicts, however, does not constitute an "external circumstance" that impeded Henderson from presenting his undue

---

[4] This relationship has been exaggerated. *See* part II of this brief.

influence argument to the Alabama courts, even when combined with the Alabama procedural deadlines and limitations he cites.

To excuse a procedural default, a habeas petitioner must establish "cause." To establish sufficient "cause," a habeas petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). "[A] showing that the factual or legal basis for a claim was not reasonably available to counsel, *see Reed v. Ross*, 468 U.S. [1,] 16 (1984),] . . . or that 'some interference by officials,' *Brown v. Allen*, 344 U.S. 443, 486 . . . (1953), made compliance impracticable would constitute cause under this standard." *Murray*, 477 U.S. at 488. Constitutionally ineffective assistance of counsel is also cause for a procedural default because the Sixth Amendment imputes responsibility for the default to the State. *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980)). However, any ineffectiveness that occurs at a stage in the proceedings when there is no constitutional right to counsel, as in state post-conviction proceedings, cannot provide "cause" for a procedural default. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991). Congress has codified this rule. *See* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.").

Apparently recognizing that post-conviction counsel's failure to reveal the alleged conflicts of interest does not itself establish "cause" for the procedural default, Henderson argues that he could not have known of the alleged conflicts unless informed by post-conviction

counsel and that, under these circumstances, counsel's failure to reveal them provides cause. Henderson has presented, however, no facts to show that the alleged conflicts were not reasonably discoverable. Indeed, the record reveals that the alleged primary conflict (Giddens's status as the brother of one of the prosecutors) was reasonably discoverable without Giddens revealing it. After Giddens's representation of Henderson ceased, on the date Henderson dismissed his Rule 32 petition, Henderson became represented by other counsel. "The Equal Justice Initiative timely filed a notice of appeal from the Rule 32 dismissal, and Henderson's current counsel prosecuted the merits of the appeal in the Alabama Court of Criminal Appeals." *Henderson*, 353 F. 3d at 899. Thus, not only could Henderson himself have discovered Giddens's relationship to one of his prosecutors but so could his competent counsel. Indeed, "[n]o claim has been made that Henderson or his counsel were ever denied any documents containing information regarding Henderson's capital trial and its participants and witnesses, including the trial transcripts." *Id.* at 899. Thus, they obviously were readily discoverable. In fact, current counsel discovered "the identicality of the last names of the Rule 32 attorney and the prosecutor" simply by reviewing the record. Pet. at 19 n. 2. Furthermore, Henderson could have made the discovery himself by relying on his own memory of his trial or reading the trial transcripts.

Clearly, Giddens's failure to reveal the alleged "conflict" does not establish that the undue influence argument was not reasonably available. Indeed, Henderson has made no assertion that there was some "interference by officials" that prevented him from discovering the conflict and raising his undue influence argument. In sum, there was no external impediment

that prevented Henderson from raising the undue influence argument.

Finally, Henderson argues that post-conviction counsel's failure to reveal his conflicts *combined* with state procedural deadlines establish "cause" for the procedural default of his undue influence argument. This argument, however, also fails because Henderson has again failed to show that some external impediment prevented him from raising his argument. The Court of Appeals correctly stated, "Henderson had an opportunity to raise this undue influence issue in either a post-judgment motion in the Rule 32 court or in his Rule 32 appeal to the Alabama Court of Criminal Appeals or both, and . . . he has presented nothing to suggest that he was impeded in anyway from raising this argument[.]" *Henderson*, 353 F.3d at 899-900.

First, Henderson asserts that the alleged conflicts could not have been discovered in time to file a motion for a new trial under Ala. R. Crim. P. 24.1 because that motion was due within 30 days of the *original* judgment. Henderson clearly misunderstands the application of Rule 24.1 to Alabama post-conviction proceedings under Rule 32. Rule 32.4 expressly states that Rule 32 proceedings are "governed by the Rules of Criminal Procedure[.]" Ala. R. Crim. P. 32.4. Rule 32.4 further explains that post-trial motions under Rule 24, including new trial motions under Ala. R. Crim. P. 24.1, can be sought from a Rule 32 judgment. Thus, his Rule 24.1 motion was due within 30 days of the circuit court's order dismissing his Rule 32 petition, not the original judgment. And, Henderson has presented no facts that show the argument was not reasonably available at that time. Henderson's alternative argument that, even if the Rule 24.1 motion was not due until 30 days after the circuit court's

judgment dismissing the Rule 32 petition, counsel who filed the notice of appeal did not have time to discover and raise the conflict also fails. Henderson is not even constitutionally entitled to state post-conviction counsel and is, thus, responsible for discovering and raising the conflict himself. Moreover, he presents no reason why EJI, if they could file a notice of appeal within 42 days, could not have raised a motion for a new trial within 30 days.

Second, Henderson asserts the following: a new Rule 32 petition, asserting the undue influence argument, would have been barred by the Rule 32.2(c) limitation period (a post-conviction petition must be filed within one year of the judgment becoming final on direct appeal) and/or rejected as a successive petition under Rule 32.2(b) (prohibiting successive petitions), and the conflicts could not have been considered by the Alabama Court of Criminal Appeals because they were not part of the post-conviction record. Henderson correctly asserts that if he filed a new Rule 32 petition asserting his undue influence argument it would be subject to dismissal under Rules 32.2(b) and (c). Henderson also correctly asserts that had he raised the conflict of interest argument for the first time on appeal from the dismissal of his Rule 32 petition, the Court of Criminal Appeals could not have properly considered it. *See, e.g., Rutledge v. State*, 745 So. 2d 912, 918-19 (Ala. Crim. App. 1999) ("Because the appellant did not raise his excessive bail claim in a petition for a writ of habeas corpus, this issue is procedurally barred from appellate review."). However, these assertions do not provide cause for the procedural default because the fact remains that Henderson reasonably could have discovered the alleged conflicts and raised the undue influence argument in the Alabama courts in a timely manner by raising it in a new trial motion.

In sum, the existence of state procedural deadlines does not represent "interference by officials." To show "cause" for a procedural default, a habeas petitioner must show "some objective factor external to the defense impeded counsel's effort to comply with the State's procedural rule." *Murray*, 477 U.S. at 488. The state's procedural rule itself cannot establish cause. Henderson has simply provided no "cause" for his failure to present his undue influence argument in a timely manner to Alabama courts. "As a result, Henderson's undue influence argument is itself procedurally defaulted without excuse, and therefore cannot be considered as cause to potentially excuse his procedural default of the claims he dismissed in his Rule 32 petition." *Henderson*, 353 F.3d at 900.

D. Even if this Court found that Henderson had provided "cause" to excuse the procedural default of his argument that post-conviction counsel had conflicts of interest that caused him to unduly influence Henderson, the argument itself is without merit because the district court has already found that counsel neither had conflicts of interest nor unduly influenced Henderson into waiving Rule 32 proceedings and the district court's findings are not "clearly erroneous."

Certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefore. *Fay v. Noia*, 372 U.S. 391, 436 (1963), overruled in part on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1977). This Court should deny certiorari review of Henderson's claim because it does not warrant certiorari consideration. Specifically, even if this Court were to hold as Henderson

urges, that he established "cause" to excuse the procedural default of his undue influence argument, this Court must still defer to the factual findings below that counsel was neither aware of the alleged conflict nor unduly influenced Henderson. Those findings were not clearly erroneous. Henderson's argument that post-conviction counsel, Giddens, had conflicts of interest that caused him to unduly influence Henderson is both without record support and contradicted by Henderson's own testimony in the federal district court. *See* Part II of this brief.

II. This Court Should Decline to Review Henderson's Claim That Post-Conviction Counsel's Conflicts of Interest Unduly Influenced Henderson To Waive Post-conviction Proceedings Because It Is Without Record Support And Contradicted by Henderson's Own Testimony in The Federal District Court.

Not only has Henderson failed to cite any of the three grounds for certiorari review under Rule 10, this claim does not lend itself to any one of those categories. Henderson argues that his post-conviction counsel, Giddens, was acting under a conflict of interest based on his brother having been one of the prosecutors at Henderson's trial and on Giddens's relationship with the victim's brother. Henderson further argues that, because of these conflicts, Giddens unduly influenced him to waive his state post-conviction proceedings. Henderson proceeds to question the magistrate judge's findings otherwise. Henderson thus merely disagrees with the district court's factual finding that "Henderson was not unduly influenced into dismissing his Rule 32 petition." *Henderson*, 353 F.3d at 900. This disagreement does not

warrant certiorari review.[5] *See* Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings[.]"). Moreover, the district court's factual findings are not clearly erroneous.

"It is well settled . . . that a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard . . . to the opportunity of the trial court to judge of the credibility of the witnesses.'" *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) (quoting Fed. R. Civ. Pro. 52(a)). This standard is highly deferential. "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting

---

[5] Henderson also alludes to an illusory conflict between the Court of Appeals's decision in his case and a Ninth Circuit case, *Manning v. Foster*, 224 F.3d 1129, 1135 (9th Cir. 2000), asserting that "[t]he actions of a conflicted, court appointed attorney, and even the resulting omissions of such an attorney constitute the sort of outside influence which meets the definition of 'cause.'" Pet. at 25. This argument is not properly before this court because it was not raised below until Henderson's application for rehearing. Nonetheless, the conflict is illusory. The Court of Appeals determined whether Giddens had a conflict of interest and whether that unduly influenced Henderson into waiving state post-conviction proceedings. Similar determinations were made in *Manning*. *See Manning*, 224 F.3d at 1135 (holding that *if counsel's actions*, although not constitutionally ineffective, were "both unauthorized and tainted by a conflict of interest" and *prevented Manning from pursuing post-conviction relief*, those actions could provide cause for the procedural default). Here, the district court's factual findings were that Giddens was not only unaware of a conflict of interest, but that Giddens did not unduly influence Henderson. Henderson himself testified that Giddens did not even "prompt" him into waiving his proceedings. In stark contrast to the situation in *Manning*, Henderson was aware of his options and counsel did not push him into a certain action or inaction.

as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). Here, the Court of Appeals, applying this standard, properly found the district court's factual findings were not "clearly erroneous." Indeed, the district court's finding that Henderson was not unduly influenced is amply supported by the record.

Contrary to Henderson's assertions, the evidence clearly shows there was no actual conflict of interest and, moreover, that Giddens did not unduly influence Henderson. There is absolutely no evidence in the record that Giddens unduly influenced Henderson to dismiss his Rule 32 petition. In fact, the only evidence in the record is that Henderson dismissed his petition freely and voluntarily.

Henderson candidly admitted in the federal evidentiary hearing that Giddens did not prompt him to go before Judge Fielding to dismiss his Rule 32 petition. Rather, Henderson testified that he dismissed his petition because "that's what I thought I wanted to do." EH. at 63. Henderson further acknowledged that Judge Fielding reviewed with him the consequences of withdrawing the petition. EH. at 64. Henderson also understood that the ultimate consequence of withdrawing his petition was that he would be executed more quickly. EH. at 66.

Steve Giddens, likewise, testified that Henderson wanted to dismiss his Rule 32 petition. EH. at 25-26. Giddens also testified that Henderson told him "he did not have any problems with his attorneys because he was guilty and that they did as well as they could do defending a guilty man." EH. at 21. Giddens further testified that he explained to Henderson the consequences of dismissal, including that such action would move him closer to his execution date. EH. at 44-45. Nonetheless,

Henderson wanted his post-conviction proceedings concluded. EH. at 46. The following day, Giddens made Henderson's wishes known to the Rule 32 trial judge. EH. at 26. During an extensive colloquy with the trial judge, Giddens never prompted Henderson to say anything nor did Henderson ever ask him what to say. EH. at 51.

As for the alleged conflicts, the testimony given at the federal evidentiary hearing reveals these to be illusory. Giddens described his relationship with the victim's brother as more of an acquaintance than a friendship. EH. at 57. Giddens also testified that, although he shared office space with his brother Rod during the time he represented Henderson, he had not been aware of his brother's involvement in the prosecution of Henderson until he received notice of the federal evidentiary hearing. EH. at 35-36, 37, 42.

Based on this uncontradicted testimony, the magistrate judge reasonably concluded that "Giddens was unaware of his brother's prior involvement in the original prosecution of Henderson and that there is no evidence that he exerted any undue influence on petitioner for that or any other reason." Pet. App. E. at 123a. In short, "Giddens's relationship to a prosecutor in this case was not a factor in petitioner's decision to waive his Rule 32 proceedings." Pet. App. E. at 123(a). Moreover, because there is ample evidence in the record to support the district court's findings, the Court of Appeals correctly concluded that these findings were not clearly erroneous. *Henderson*, 353 F.3d at 900. Indeed, as the Court of Appeals recognized, "Henderson's own testimony" supported these findings. *Id.*

According to Henderson's counsel, Giddens reviewed "significant portions of the transcript" that contained numerous references to his brother "who examined five witnesses . . . and gave the closing arguments in both the guilt and penalty phases." Pet. at 22. That is false. Giddens testified that he reviewed small parts of the transcript, including "some of the voir dire" and "some of the pretrial motions." EH. at 28. Giddens did not review the closing arguments nor speak to trial counsel. EH. at 30, 35-36. Later, counsel come closer to the truth when they assert that Giddens reviewed just a "few smidgens" of the transcript. Pet. at 24.

Counsel's suggestion that Giddens's brother had a major role in Henderson's capital trial also exaggerates the truth. Rod examined only five of the 28 guilt phase witnesses, covering only 19 of the 649-page guilt phase transcript. And, although Rod gave the initial closing arguments at the guilt and penalty phases, the District Attorney, Robert Rumsey, gave the final closing arguments at both phases; moreover, Rod's arguments occupied only nine pages of the trial transcript. Counsel also assert that Giddens must have known of his brother's participation in the trial because they shared office space at the time Giddens represented Henderson, Henderson's case was "high-profile," and Talladega has a "close-knit legal community." Pet. at 22. However, it is equally plausible that the brothers did not discuss every case they were handling with each other and that Giddens, absorbed by his own practice, was unaware of his brother's involvement in Henderson's prosecution. In fact, Giddens expressly testified that he was unaware Rod had assisted in Henderson's prosecution. Nothing in the record contradicts or undermines Giddens's testimony.

Henderson's counsel also allege that Giddens and the victim's brother were "good friends" and that their friendship must have influenced Giddens's representation of Henderson. Pet. at 22. In actuality, Giddens acknowledged that he had known Billy Haney, a Talladega police officer, since the late 1970's, EH. at 13, but he refuted the claim that they were "good friends," describing their relationship more as an acquaintanceship. EH. at 57. No matter what level of relationship, nothing in the record suggests that it influenced Giddens to influence Henderson to dismiss his Rule 32 petition.

Finally, Henderson's counsel claim that Giddens admitted that if he had known of the conflict, he would have been "compelled to decline the appointment." Pet. at 24. Giddens's actual testimony was that, *if* the Rule 32 petition had alleged malfeasance against his brother in the role as prosecutor, he would have "asked Judge Fielding if he wanted somebody else and withdrawn." EH. at 51. Giddens made no statements about what he would have done had he simply been aware that his brother had a role in the prosecution. Indeed, it is far from clear that his brother's role would have created any conflict of interest even if Giddens had been aware of it; Henderson has never claimed that Rod engaged in misconduct as a prosecutor.

Regardless, Giddens testified without contradiction that he did not know about his brother's role in Henderson's prosecution. Even if the Sixth Amendment were applicable to post-conviction proceedings, which it is not, this Court's precedents establish that, under these circumstances, Giddens did not have an actionable conflict of interest. "In order to establish a violation of the Sixth Amendment, . . . [a defendant] must

demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). To make this showing, a defendant must demonstrate "that his counsel actively represented conflicting interests," *id.* at 350, and he must demonstrate "that the attorney 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.'" *Barham v. United States*, 724 F. 2d 1529, 1532 (11th Cir. 1984) (quoting *United States v. Mers*, 701 F.2d 1321, 1328 (11th Cir. 1983)). *See also* Committee Comments to Rule 1.7 of the Alabama Rules of Professional Conduct ("Loyalty to a client is . . . impaired when a lawyer cannot consider, recommend or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests"). There is no such evidence in this case.

The proposition that Henderson was improperly influenced by his post-conviction counsel is desperate and fanciful. The record clearly demonstrates that Henderson dismissed his state post-conviction petition on his own volition. Indeed, both Giddens and Henderson testified that Giddens exerted no influence over Henderson to dismiss the petition. EH. 49, 63. Henderson's current counsel's claim otherwise is, thus, wholly without merit.

III. This Court Should Decline to Review Henderson's Claim That His Waiver of His Right to Proceed Under Alabama Rule 32 Was Not "Knowing, Voluntary, and Intelligent" Because The Proper Standard, the "Rational Choice" Test, Was Applied and Satisfied and, Moreover, Even If the Test Henderson Advocates Was Applied, the Result Would Be The Same.

Not only has Henderson failed to cite any of the three grounds under Rule 10 that provide a basis for certiorari review, his petition does not lend itself to any one of these categories. Henderson asserts that application of this Court's decision in *Rees v. Peyton*, 384 U.S. 312 (1966), to his situation by the Alabama Court of Criminal Appeals and the Eleventh Circuit "represents an unreasonable application of clearly established federal law. Pet. at 27. He proceeds to argue that the standard the courts should have applied is that set forth by this Court in *Godinez v. Moran*, 509 U.S. 389 (1993). Although Henderson does not expressly cite a Rule 10 ground for certiorari, he appears to be arguing that this Court should review his claim because "a state court or a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). This ground, however, does not apply because the *Rees* standard, not the *Godinez* standard Henderson advocates, clearly governs the determination regarding the validity of a waiver of post-conviction review. Moreover, the real issue is whether the application of *Rees* by the Alabama Court of Criminal Appeals "[r]esulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States[.]' 28 U.S.C. § 2254(d). Only under these limited circumstances can habeas relief be granted when the claim was adjudicated on the merits in a state court. 28 U.S.C. § 2254(d).

In finding that the Alabama court's determination that Henderson was competent to waive his post-conviction proceedings was not "unreasonable," either factually or legally, the Court of Appeals also evaluated Henderson's waiver under *Rees*, noting that *Rees* establishes "the controlling legal standard for assessing

the validity of a death row inmate's choice to forego post-conviction review." *Henderson*, 353 F.3d at 893. Moreover, even under the allegedly more stringent *Godinez* standard, Henderson's waiver would still be found valid. Thus, this Court should also deny certiorari because a ruling on this issue will not alter the result in this case.

A. The Alabama Court of Criminal Appeals Properly Applied The "Rational Choice" Test from *Rees v. Peyton* In Determining that Henderson Was Competent to Waive His Right to Proceed under Alabama Rule 32 Because Neither A Statutory Nor A Constitutional Right Was Waived, as in *Godinez*, But Post-conviction Proceedings, as in *Rees*.

The Alabama Court of Criminal Appeals, as well as the Eleventh Circuit, properly applied the test established in *Rees*, which held that a condemned person may waive collateral challenges to his conviction and sentence provided he "has capacity to appreciate his position and make a rational choice with respect to continuing or abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Rees*, 384 U.S. at 314. Henderson's attempt to distinguish *Rees* from his situation by arguing that, in *Rees*, "[s]omeone other than the inmate wished to proceed over the inmate's objection[,]" fails. Pet. at 26.

In *Rees*, the habeas petitioner sought review of his state court conviction and sentence of death. 384 U.S. at 312-13. This Court remanded for the federal district court to determine the petitioner's competence, "that is, whether he has capacity to appreciate his position and make a rational choice with respect to continuing or

abandoning further litigation or on the other hand whether he is suffering from a mental disease, disorder, or defect which may substantially affect his capacity in the premises." *Id.* at 313-14. *Rees* thus established that a death row inmate may choose not to seek collateral relief provided that he is "competent."

Like Rees, Henderson made a decision not to pursue collateral relief. It should make no difference that Rees chose not to pursue certiorari review after federal habeas relief was denied while Henderson chose not to pursue state post-conviction relief. And, the difference Henderson alleges, that he, unlike Rees, wishes to pursue collateral relief, is illusory. Clearly, an inmate's waiver decision must be evaluated at the time made not when he has changed his mind at some later date. At the time Henderson made the decision to waive post-conviction proceedings, he clearly did not wish to pursue post-conviction relief. That he now wishes he had not abandoned his legal challenges of his conviction and sentence certainly does not necessitate that a higher standard, the standard set forth in *Godinez*, be applied to evaluate his earlier decision. *Rees* was clearly on point and, thus, correctly applied to Henderson's case. Moreover, if the waiver decisions made by Rees and Henderson were deserving of the application of different standards, there is a better argument that Rees, not Henderson, deserved the higher standard because Rees' competency was in question. Henderson's mental competence has never been questioned. Thus, Henderson's waiver decision certainly does not merit a higher standard than that applied in *Rees*.

Finally, the standard that Henderson argues should have been applied, the "knowing, voluntary, and intelligent" test set forth in *Godinez v. Moran*, 509 U.S.

389 (1993) and *Johnson v. Zerbst*, 304 U.S. 458 (1938) is clearly inapplicable. In both of those cases, the waiver decisions being evaluated, regarding pleading guilty and the right to counsel, were important *statutory* and *constitutional* rights. In this case, Henderson waived his right to proceed under a *rule* promulgated by the Alabama Supreme Court.[6] The Alabama Supreme Court could eliminate Rule 32 and not allow for state collateral attacks. Thus, Henderson, unlike Johnson or Moran, did not waive a statutory or constitutional right. Clearly, the Court of Criminal Appeals correctly applied *Rees*, not *Godinez*, to Henderson's case. Moreover, the Court of Criminal Appeals correctly determined that Henderson, like Rees, "understood the legal options available to him and that he made a rational choice from those options." *Henderson*, 733 So. 2d at 490. *See also Henderson*, 353 F. 3d at 895 ("Henderson understood the 'bottom line' of his legal situation, that he had to continue to engage in the collateral review process or be executed and that he was able to make a rational choice among these options.") Indeed, Henderson's counsel has never contested this competence finding. Henderson merely argues that the "knowing, voluntary, and intelligent" test was neither applied nor met.

B. Even if This Court Were to Hold as Henderson Advocates, That *Godinez* Not *Rees* Applies, the Result Would Be the Same Because the Court of Criminal Appeals Found the Facts That Clearly Show Henderson's Waiver Was "Knowing, Intelligent, and Voluntary" and the Court of Appeals Has Already Found These Findings Were Not "Clearly Erroneous."

---

[6] The Constitution of Alabama (1901) gives the Alabama Supreme rule-making authority. Amend. 328, 6.11.

Although *Rees*, not *Godinez*, is the appropriate standard to apply to Henderson's case, the record and the opinions of the courts below all reveal that the *Godinez* standard was nonetheless met. This Court should deny certiorari review of Henderson's claim because it does not warrant certiorari consideration. The issue Henderson raises is immaterial to the outcome of his case. Specifically, even if this Court ruled that *Godinez* applied, the result on remand would be the same. Based on the opinions below and the factual findings to which this Court and the Court of Appeals owe deference, Henderson's waiver was "knowing, voluntary, and intelligent" under *Godinez* and is, thus, valid under both *Rees* and *Godinez*.

"The purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand [as opposed to merely having the ability to understand] the consequences of a particular decision and whether the decision is uncoerced." *Godinez v. Moran*, 509 U.S. 389, 400-01 fn. 12 (1993). Although the Court of Criminal Appeals did not cite *Godinez*, the court nonetheless found that Henderson possessed the "requisite mental competence to dismiss his petition and that he did so voluntarily, knowingly, and intelligently." *Henderson v. State*, 733 So. 2d 484, 490 (Ala. Crim. App. 1998). Specifically, the Court of Criminal Appeals found that, during his extensive colloquy with the Rule 32 trial court, Henderson answered the court's questions with appropriate responses and demonstrated knowledge of the legal system, the course of his trial, the available appeals, and the post-conviction petition." *Id.*; *see also id.* at 486-87 (the colloquy quoted in its entirety). In sum, the Court of Criminal Appeals not only found the *Godinez* standard met, but even tracked the "knowing, voluntary, and intelligent" language.

Under AEDPA, "a determination of a factual issue made by a State court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). The court's finding may be set aside only if it was "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Henderson has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). Henderson never even made any argument to the Court of Appeals that the state court unreasonably determined the facts. Thus, if this cause were remanded for the Court of Appeals to apply *Godinez*, the Court of Appeals will be required to defer to the state court's findings, which have not been shown to be clearly erroneous and, further, which reveal that the *Godinez* standard was met even though not expressly applied. Indeed, the state court already found all of the facts pertinent to the *Godinez* inquiry.

One of those findings was that Henderson understood his Rule 32 petition was filed in order to obtain a new trial. *Henderson*, 733 So. 2d at 489. Henderson also understood that, by dismissing his petition, he would not receive a new trial and would damage his chances to prevail on appeal in both state and federal court and to win a new trial. *Id.* Henderson further understood that he was hastening his execution by dismissing his petition. *Id.* The court also found no one had "threatened, coerced, or tricked" Henderson into dismissing his petition. *Id.*

It must further be noted that the federal magistrate judge also found Henderson's waiver decision was "knowing and voluntary" using the precise standard Henderson proposes from *Godinez*. Pet. App. E. p. 123a. Specifically, the magistrate judge found that Henderson "understood the significance of what he was doing and the

consequences thereof." Pet. App. E. p. 123a. The magistrate also found "no evidence that [Giddens] exerted any undue influence on [Henderson.]" Pet. App. E. p. 123a.

Finally, the Court of Appeals has already agreed with the Court of Criminal Appeals that "Henderson understood the "bottom line" of his legal situation, that he had to continue to engage in the collateral review process or be executed[.]" *Henderson*, 353 F.3d at 895. The Court of Appeals also found that "Henderson had a basic understanding of the purpose of the Rule 32 proceedings which he was deciding to abort, namely an effort to get a new trial." *Id.* at 895. Thus, the Court of Appeals, like the district court, held that Henderson's "lack of understanding argument for cause is without merit." *Id.* The Court of Appeals also held that "Henderson was not unduly influenced into dismissing his Rule 32 petition." *Id.* at 880. In sum, the Court of Appeals has already found that Henderson actually understood the consequences of his waiver decision, as well as found that Henderson's decision was uncoerced. The result, therefore, would be the same if this Court were to remand this cause for *Godinez* to be expressly applied.

CONCLUSION

For the foregoing reasons, Henderson's petition for a writ of certiorari should be denied.

Respectfully submitted,

Troy King
Attorney General

Kevin C. Newsom
Solicitor General

J. Clayton Crenshaw
Assistant Attorney General
Counsel of Record *

Regina F. Speagle
Deputy Attorney General

State of Alabama
Office of the Attorney General
11 South Union Street
Montgomery, AL 36130-0152
(334) 242-7401, 242-7423 *